United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS

for the

DISTRICT OF COLUMBIA CIRCUIT

No. 19, 150

JAMES G. CAREY,

Plaintiff-Appellant,

v.

JAMES V. BENNETT,

Defendant-Appelee.

Appeal from the United States District Court
for the District of Columbia

JAMES G. CAREY,

Plaintiff-Appellant,
in Propria Persona

4531 Avery
Detroit, Michigan 48208

STATEMENT OF QUESTIONS PRESENTED

I

IS THE DIRECTOR OF THE FEDERAL BUREAU OF PRISONS AND/OR HIS ASSISTANTS LEGALLY INVESTED WITH THE LEGAL POWER TO ORDER THE TRANSFER OF A FEDERAL PRISONER CONFINED ALLEGEDLY UNDER THE PROVISIONS OF SECTION 4241, TITLE 18, U. S. C., UNTIL HOURS BEFORE THE EXPIRATION OF HIS SENTENCE TO ANOTHER STATE?

The District Court, by implication, answered "yes."

Plaintiff-appellant contends the answer should be "no."

II

IS NOT THE TRANSFER OF A FEDERAL PRISONER WHO HAS BEEN DETAINED AT THE MEDICAL CENTER FOR FEDERAL PRISONERS FOR THE MAXIMUM OF HIS SENTENCE SOLELY AND EXPLICITLY GOVERNED BY THE PROVISIONS OF SECTION 4243, TITLE 18, U.S.C.?

The District Court, by implication, answered "no."

Plaintiff-appellant contends the answer should be "yes."

III

SHOULD THE DEFENDANT-APPELLEE BE EXCUSED FROM ANY AND ALL LEGAL RESPONSIBILITY FOR THE DELIBERATE CRIMINAL VIOLATIONS COMITTED AGAINST PLAINTIFF-APPELLANT ON THE GROUNDS THAT HE (DEFENDANT-APPELLEE) WAS ABSOLUTELY IGNORANT OF WHAT HAD TRANSPIRED?

The District Court, by implication, answered "yes."

Plaintiff-appellant contends the answer should be "no."

STATEMENT OF QUESTIONS PRESENTED

IV

THOUGH THE INFORMATION CITED IN PLAINTIFF-APPELLANT'S COMPLAINT WAS CORRECT AND COMPLETELY SUBSTANTIATED, SHOULD IT BE DISMISSED AS INVALID BECAUSE OF HIS FAILURE TO INCLUDE THE WORD et al., AFTER THE DEFENDANT-APPELLEE'S NAME?

The District Court, by implication, answered "yes."

Plaintiff-appellant contends the answer should be "no."

V

DID THE COURT ERR WHEN IT ACCEPTED THE MERE STATEMENTS CONTAINED IN THE AFFIDAVITS ATTACHED TO DEFENDANT-APPELLEE'S MOTION AS SUFFICIENT PROOF TO REFUTE THE DOCUMENTED EVIDENCE SUBMITTED BY PLAINTIFF-APPELLANT?

The District Court, by implication, answered "no."

Plaintiff-appellant contends the answer should be "yes."

TITLE PAGE

James G. Carey, Plaintiff-Appellant

James V. Bennett, Defendant-Appellee

INDEX AND TABLE OF CASES

CASES CITED:

Index and Table of Cases

CASES CITED: (Cont'd)

No. 19,150

In the

United States Court of Appeals
for the
District of Columbia Circuit

JAMES G. CAREY,

Plaintiff-Appellant,

v.

JAMES V. BENNETT,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

Jurisdictional Statement

1. Allegation of Jurisdiction.

(a) Plaintiff-appellant is a citizen of the State of Michigan and the defendant-appellee was (at the time the complaint was originally filed) the director of the Federal Bureau of Prisons, with his office located in Washington, D. C.

The matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars.

(b) Jurisdiction founded on the existence of a Federal question and amount in controversy.

The action arises under the Fifth, Sixth, Eighth, and Ninth Amendments to the Constitution of the United States, Sections 242, 401, 1201, and 1581 of Title 18, United States Code, as hereinafter more fully appears.

Jurisdictional Statement

The matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars.

2. United States District Court for the District of Columbia granted defendant-appellee's Motion to dismiss and alternative motion for summary judgment on December 2, 1964.

3. Jurisdiction of appeal founded on Section 1291, Title 28, U.S.C. The Defendant's Motion to Dismiss and Alternative Motion for Summary Judgment, which was granted by the United States District Court for the District of Columbia, failed to disprove the documented evidence presented in Plaintiff-appellant's original Complaint (i.e., Exhibits B, C, E, F, I, J, and K). Though the Defendant's Motion to Dismiss, etc., often recited reference to something called the official record, it failed to incorporate any portion of said "official record" as an exhibit. Not a single allegation cited in plaintiff-appellant's Complaint was disproven.

Statement of Facts

While a prison inmate under the custody of the defendant-appellee, plaintiff-appellant was seized in the United States Medical Center for Federal Prisoners in the State of Missouri and unlawfully transported into the State of Michigan (Complaint 3).

Defendant-appellee, through his agents, prevented plaintiff-appellant from exercising his basic Constitutional right to petition the United States District Court for the Western District of Missouri on several occasions (Complaint 1, 2, and 3).

Statement of Facts

Plaintiff-appellant was brutally assaulted by agents of the defendant-appellee while en route to being unlawfully transported into the State of Michigan (Complaint 3 and 4).

On October 16, 1962 plaintiff-appellant was transferred from the Federal Penitentiary at Terre Haute, Indiana to the Federal Correctional Institution at Milan, Michigan (Complaint 4). He was arrested there the following day by two police officers from Macomb County (Michigan) and taken directly to the Southern Michigan Prison wherein he was confined until July 27, 1964 (Complaint 4).

Statement of Points

1. The District Court erred in granting defendant-appellee's Motion to Dismiss on the grounds that there was no genuine issue as to any material fact.

2. Defendant-appellee erred in alleging that he was not directly involved in the making of the order directing plaintiff-appellant's transfer as a Federal prisoner from the Medical Center for Federal Prisoners to the Federal Correctional Institution at Milan, Michigan in October, 1962.

3. Those officials of the Federal Bureau of Prisons who were responsible for the unlawful transporting of plaintiff-appellant were not acting in the course and within the scope of their official duties as officers of the Federal Bureau of Prisons.

ARGUMENT

I

IS THE DIRECTOR OF THE FEDERAL BUREAU OF PRISONS AND/OR HIS ASSISTANTS LEGALLY INVESTED WITH THE LEGAL POWER TO ORDER THE TRANSFER OF A FEDERAL PRISONER CONFINED ALLEGEDLY UNDER THE PROVISIONS OF SECTION 4241, TITLE 18, U. S. C., UNTIL HOURS BEFORE THE EXPIRATION OF HIS SENTENCE TO ANOTHER STATE?

The District Court, by implication, answered "yes."

Plaintiff-appellant contends the answer should be "no."

The legal power for transferring a federal prisoner under the provisions of Section 4082, Title 28, U.S.C., does not apply in the case where a prisoner has been detained in the Medical Center for Federal Prisoners for the maximum of his sentence. Section 4243, Title 18, U.S.C. provides explicit instructions for transferring such prisoners. On this particular point of law, defendant-appellee did not plead ignorance. His agents had actually made arrangements for plaintiff-appellant's transfer to Michigan under the provisions of Section 4243, Title 18, U.S.C. (Complaint 5). The excuse that plaintiff-appellant was unlawfully shipped to Michigan because of two detainers which had been lodged against him by the Michigan authorities fails to in any way justify this unlawful act; those detainers had been in the hands of the officials of the Federal Bureau of Prisons since November, 1957. Moreover, it is the policy of the Federal Bureau of Prisons to return a prisoner to the state which has a detainer against him upon reaching his Correctional Release Date, which constitutes two-thirds of a prisoner's sentence.

ARGUMENT

Instead of releasing plaintiff-appellant to the Michigan authorities at the time of his Correctional Release Date (June, 1961), defendant-appellee caused him to remain confined in the Medical Center for Federal Prisoners allegedly under the provisions of Section 4241, Title 18, U.S.C. (Defendant's Motion to Dismiss, Exhibit 1, p. 2) until the final days of his five year sentence only to have him shipped into Michigan as a sane federal prisoner to insure his further imprisonment as a state prisoner. Subsequent to his arrival into Michigan, plaintiff-appellant was informed that if he had been transferred into Michigan -- as was previously arranged -- under the provisions of Section 4243, Title 18, U.S.C., he would have been placed in the Wayne County General Hospital and released shortly thereafter.

In one of those rare instances when defendant-appellee did not claim immunity by ignorance, he shed painful, pious tears over the unconstitutional abuses of a prisoner's rights imposed by those prison officials who "use a detainer as a means of frustrating the decisions of the court." He even admitted:

> "I feel that the detainers are a bar to justice. Not only do they interfere with the sentence of another court, cause inhuman anxiety and suffering on the part of the detainee, but when the demanding State prosecutor or agency does not make a diligent effort in good faith to dispose of pending charges promptly, he is violating Constitutional rights." (Complaint 8)

ARGUMENT

II

IS NOT THE TRANSFER OF A FEDERAL PRISONER WHO HAS BEEN DETAINED AT THE MEDICAL CENTER FOR FEDERAL PRISONERS FOR THE MAXIMUM OF HIS SENTENCE SOLELY AND EXPLICITLY GOVERNED BY THE PROVISIONS OF SECTION 4243, TITLE 18, U. S. C. ?

The District Court, by implication, answered "no."

Plaintiff-appellant contends the answer should be "yes."

Section 4243, Title 18, U.S.C., reads in pertinent part as follows:

> "The superintendent of the United States hospital for defective delinquents shall notify the proper authorities of the State, Territory, District, or Possession where any insane prisoner has his legal residence ... of the date of expiration of sentence of any prisoner who in the judgment of such superintendent, is still insane or a menace to the public. Such superintendent shall cause such prisoner to be delivered into the custody of the proper authorities of such State, Territory, District or Possession."

In the Defendant's Reply to Show Cause Order (Carey v. Settle, 4-63 Misc.), the United States Attorney for the Western District of Missouri admitted:

> "On October 1, 1962 authorization was received from the Department of Mental Health, Lansing (,) Michigan for the return of Carey to that State, which action was contemplated pursuant to Section 4243, Title 18, United States Code."

He also stated in that same document:

> "On October 8, 1962 the Director of the Bureau of Prisons directed Carey's Transfer to the Federal Correctional Institution, Milan, Michigan, to cooperate with State authorities." (Emphasis added.)

ARGUMENT

III

SHOULD THE DEFENDANT-APPELLEE BE EXCUSED FROM ANY AND ALL LEGAL RESPONSIBILITY FOR THE DELIBERATE CRIMINAL VIOLATIONS COMMITTED AGAINST PLAINTIFF-APPELLANT ON THE GROUNDS THAT HE (DEFENDANT-APPELLEE) WAS ABSOLUTELY IGNORANT OF WHAT HAD TRANSPIRED?

The District Court, by implication, answered "yes."

Plaintiff-appellant contends the answer should be "no."

Plaintiff-appellant's repeated petitions for his freedom while under custody of defendant-appellee were routinely denied by the United States District Court for the Western District of Missouri on the point of law that the only avenue of relief open to a citizen under such circumstances is through a civil action. After having survived seven years of imprisonment (four years of which were spent in the infamous Medical Center for Federal Prisoners), plaintiff-appellant is now informed by the defendant-appellee's attorneys that he is not entitled to damages for the brutalities, inhumanities, and illegalities inflicted upon him by defendant-appellee and his subordinates on the alleged technicality that defendant-appellee is legally immune from any legal responsibility for any criminal violations committed by his subordinates against prisoners legally entrusted to his care, in which he did not personally participate. This recreant abuse of immunity was obliterated at the Nurnberg War Trials. Mr. Justice Jackson, Chief Counsel for the United States at the Trials of the Major War Criminals, stated:

> "Of course, the idea that a state, any more than a corporation, commits crimes, is a fiction. Crimes

ARGUMENT

> always are committed only by persons. While it is quite proper to employ the fiction of responsibility of a state or corporation for the purpose of imposing a collective liability, it is quite intolerable to let such a legalism become the basis of personal immunity.
>
> "The Charter recognizes that one who has committed criminal acts may not take refuge in superior orders nor in the doctrine that his crimes were acts of state. These two principles working together have heretofore resulted in immunity for practically everyone concerned in the really great crimes against peace and mankind. Those in lower ranks were protected against liability by the orders of their superiors. The superiors were protected because their orders were called acts of state." (The Transcript of the International Military Tribunal, Volume II, p. 150)

The serious allegations cited in plaintiff-appellant's Complaint were not disproved by defendant-appellee. The only question raised by defendant-appellee is whether he or his subordinates are to be held responsible. The criminal violations inflicted upon plaintiff-appellant were violations which were commonly inflicted upon various prisoners at the Medical Center for Federal Prisoners. Some prisoners were brutally beaten to death; others were beaten to insanity. It was a common practice for a doctor to order a prisoner placed in solitary confinement where he was denied access to his legal papers when it was known that the particular prisoner was working against a time-limit to prepare a brief for court. He would quite often be kept therein until the time-limit for submitting his brief expired. These criminal acts were carried out in such a manner as to indicate that they were part of a well-established method of procedure. The doctors assigned to the Medical Center as part of their training were pre-warned not to

ARGUMENT

question, but only to obey the established procedure of that institution. The procedures for operating the United States Medical Center for Federal Prisoners were laid down by the Director of the Federal Bureau of Prisons. The point is that the illegal treatment inflicted upon plaintiff-appellant was not an exception, but the rule of long standing. Unless, therefore, it can be proven that defendant-appellee was a complete imbecile -- in which case, the theory that he was able to retain his position as director of the Federal Bureau of Prisons for a period of twenty-seven years and remain completely oblivious of the internal operations of that bureau would hold true. On the other hand, if it is to be assumed that defendant-appellee was competent, then the burden of responsibility for the criminal violations committed against plaintiff-appellant must be laid to rest upon defendant-appellee insofar as he (defendant-appellee) was the author of the procedures for inflicting illegal treatment upon various prison inmates. In personal interviews conducted by plaintiff-appellant, many guard of the Federal Bureau of Prisons expressed a genuine repugnance at having to beat defenseless prisoners, but that they did so solely to remain in good standing with their superiors. To reason that defendant-appellee is excused from any legal responsibility for the criminal acts executed by his subordinates by virtue of the fact that he did not personally participate in the actual execution of those acts would be to excuse Hitler and Stalin from any responsibility for the atrocities committed by their respective subordinates; they likewise could have alleged their innocence on the tenuous claim that they did not personally participate in the atrocious acts executed by their respective subordinates.

ARGUMENT

In the case of Norton v. Shane, 332 F 2d 855; 858-59, the Court said:

> "Any case involving doctrine of executive or official immunity requires court to resolve sharp conflict between two important considerations: protection of individual citizens against damage caused by oppressive or malicious action on part of public officers, and protection of public interest by shielding responsible government officers against harassment and inequitable hazards of vindictive or ill-founded damage suits based on acts done in exercise of their official responsibilities.
>
> "As to judicial, legislative and executive officers, test to determine existence of immunity from suit for monetary recovery based on allegedly wrongful conduct is whether or not officers were acting within scope of their authority or in discharge of their duties.
>
> "A government official's act, to be immune from damage suit, must have more or less connection with general matters committed by law to officer's control or supervision, and not be manifestly or palpably beyond his authority." (Emphasis added.)

ARGUMENT

IV

THOUGH THE INFORMATION CITED IN PLAINTIFF-APPELLANT'S COMPLAINT WAS CORRECT AND COMPLETELY SUBSTANTIATED, SHOULD IT BE DISMISSED AS INVALID BECAUSE OF HIS FAILURE TO INCLUDE THE WORD et al., AFTER THE DEFENDANT-APPELLEE'S NAME?

The District Court, by implication, answered "yes."

Plaintiff-appellant contends the answer should be "no."

In creating the issue as to exactly who signed which order, as was done by defendant-appellee's attorneys, in no way disproved the allegations placed against defendant-appellee by plaintiff-appellant. In the interest of justice, the fact that plaintiff-appellant's position as a prison inmate of one of the most abominable prisons in the United States made it virtually impossible without endangering his very life to make enquiries as to who was responsible for each specific criminal violation committed against him. Common sense would indicate that plaintiff-appellant could not have been expected to memorize the facial characteristics or badge numbers of the various members of the goon squad while he was being beaten. In the case of Panella v. U. S. 216 F 2d 622-23, the court said:

> "3. Object of Court in construing Tort Claims Act should be to read the act so as to make it consistent and equitable, in which court should be untrammeled by any rule of strict or liberal construction." 28 U.S.C.A. Section 1346, 2674, 2680.

ARGUMENT

V

DID THE COURT ERR WHEN IT ACCEPTED THE MERE STATEMENTS CONTAINED IN THE AFFIDAVITS ATTACHED TO DEFENDANT-APPELLEE'S MOTION AS SUFFICIENT PROOF TO REFUTE THE DOCUMENTED EVIDENCE SUBMITTED BY PLAINTIFF-APPELLANT?

The District Court, by implication, answered "no."

Plaintiff-appellant contends the answer should be "yes."

A verdict of finding must rest upon facts proved (Poels v. Brown, 78 Nebr. 783, 111 NW 789; Conrady v. V. Loewer's Gambrinus Brewery Co., 107 NYS 94; Jock v. Columbia, etc., R. Co., 53 Wash. 437, 102 P 405). There must be legal evidence of every material fact necessary to support the verdict of finding, and such verdict or finding, must be grounded on a reasonable certainty as to probabilities arising from a fair consideration of the evidence and not a mere guess or on possibilities. (Indianapolis, etc., R. Co. v. Hubbard, 36 Ind. A. 160. 74 NE 535; Denver, etc., R. Co. v. Thompson (Colo.) 169 P 539).

Mr. H. G. Moeller, Assistant Director of the Federal Bureau of Prisons, in his affidavit ("Government Exhibit 1," Defendant's Motion to Dismiss), with appalling flippancy attempted to dismiss appellant's allegation that several of his petitions for writ of habeas corpus were prevented from being sent to the United States District Court (Complaint 1, 2, 3) by "certifying" that "all institutions in the Federal Bureau of Prisons, including the Medical Center for Federal Prisons, are under instructions to forward promptly and without censorship or interference, any legal documents

ARGUMENT

or communications which any inmate prepares for submission to any court." The obvious inference of that statement is that the officials of the U. S. Medical Center could not possibly have interferred with plaintiff-appellant's communications to the United States District Court since they had been previously instructed not to do such things by their superiors in Washington, D. C. He did not even bother to offer an explanation as to what happened to plaintiff-appellant's communications -- duplicate copies of which were attached as Exhibits to plaintiff-appellant's Complaint. Is the court to conclude that Judge Becker, Judge Duncan and the Clerk of the Court for the United States District Court for the Western District of Missouri each lied when they stated that they did not receive the communications sent to them by plaintiff-appellant?

If Mr. Moeller's contention that the top men who rule the Federal Bureau of Prisons maintain an iron-fisted control over the actions of their subordinates -- a fact attested to by Mr. Moeller's willingness to refute plaintiff-appellant's documented allegations solely on the contention that his subordinates would not dare go contrary to their superiors' instructions, then it must be concluded that it would have been an impossibility for defendant-appellee's subordinates to have committed criminal violations against plaintiff-appellant without defendant-appellee's foreknowledge and approval.

In lieu of presenting documented evidence to substantiate his contentions, defendant-appellee made generous reference to something called the "official record." No doubt, the official record of the Prosecutor's

ARGUMENT

Office for the Imperial Court of Rome showed irrefutably that the defendant named Jesus of Nazareth was guilty of committing a capital offense, for which He was justly executed. The "official record" showed that Joan of Arc was a proven heretic, a crime for which she was justly executed. The "official record" showed that every inmate of the concentration camps throughout Germany during the Second World War were well cared for. No doubt the "official record" kept by the bureaucrats of the Russian Secret Police will show that every one of the inmates in the countless concentration camps throughout Russia is hysterically delighted with his imprisonment. The point is that any "official record" kept by any bureau will show whatever the bureaucrats wish to have it show. The word of a bureaucrat should not be taken over documented evidence.

RELIEF

Plaintiff-appellant prays for an order reversing the judgment of the District Court, and directing the entry of a judgment n. o. v. in favor of plaintiff-appellant; or in the alternative he prays for an order reversing the judgment of the trial court and remanding this action for a new trial.

Respectfully submitted,

James G. Carey, Plaintiff-appellant, in Propria Persona

4531 Avery
Detroit, Michigan 48208

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,150

JAMES G. CAREY, APPELLANT

v.

JAMES V. BENNETT, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
GIL ZIMMERMAN,
PATRICK H. CORCORAN,
Assistant United States Attorneys.

C.A. No. 2280-64

QUESTION PRESENTED

In the opinion of the appellee the following question is presented:

Is appellant entitled to damages from appellee, the former Director of the Bureau of Prisons, for alleged tortious conduct of appellee's subordinates while appellee was Director, such alleged actions occurring in the line of official duties and without appellee's personal knowledge or participation?

INDEX

TABLE OF CASES

* Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,150

JAMES G. CAREY, APPELLANT

v.

JAMES V. BENNETT, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On September 16, 1964, appellant filed *pro se* a complaint (C.A. No. 2280-64) in the District Court against appellee, the former Director of the Bureau of Prisons, demanding damages for alleged tortious conduct by subordinates. The Government on November 16, 1964, filed "Defendant's Motion to Dismiss and Alternative Motion for Summary Judgment." On December 18, 1964, Judge Tamm granted appellee's motion and dismissed the action. This appeal followed.

On October 18, 1957, appellant pleaded guilty in the United States District Court for the Eastern District of Michigan to the offense of interstate transportation of stolen property in violation of 18 U.S.C. § 2314 and was sentenced by Judge Freeman to imprisonment for five (5) years. Appellant was transferred on October 31, 1957, to the United States Penitentiary at Terre Haute, Indiana, for service of his sentence. On August 20, 1958, the medical authorities at Terre Haute certified that appellant was of unsound mind pursuant to 18 U.S.C. § 4241. H. G. Moeller, Assistant Director of the Federal Bureau of Prisons, ordered appellant transferred to the Medical Center for Federal Prisoners in Missouri, which order was carried out on September 4, 1958. Appellant remained at the Medical Center for the duration of his federal sentence, as provided in 18 U.S.C. § 4241.

On October 5, 1962, H. G. Moeller ordered by teletype the Warden at the Medical Center to make arrangements for the transfer of appellant to the Federal Correctional Institution at Milan, Michigan, located in the Eastern District of Michigan. Pursuant to 18 U.S.C. § 4082, Moeller signed official orders for the transfer. Appellant was transferred to Milan, Michigan, on October 16, 1962, and released from federal custody at the expiration of the full term of his sentence on October 17, 1962.[1]

Appellant filed *pro se* on September 16, 1964, the present complaint (C.A. No. 2280-64) in the District Court. In this complaint appellant alleged that while a federal prisoner and while appellee was serving as Director of the Federal Bureau of Prisons, he was "unlawfully" transported "for malicious purposes" from the Medical Center to Milan, Michigan, that he resisted this transfer on October 16, 1962, by barricading himself in a cell and was "brutally assaulted" by officers of the Federal Bureau of Prisons while they were extricating him from that

[1] Affidavit of H. G. Moeller, Assistant Director, Federal Bureau of Prisons, executed November 4, 1964.

cell, and that his petitions for writ of habeas corpus were "unconstitutionally" prevented from being sent to the United States District Court for the Western District of Missouri. On November 16, 1964, the Government filed "Defendant's Motion to Dismiss and Alternative Motion for Summary Judgment" in the District Court incorporating an affidavit of appellee executed on November 4, 1964. In this affidavit appellee stated that he did not recall personally ordering appellant's transfer, that he could find no record to indicate that he had done so, and that having examined appellant's complaint he stated that he was not and had never been aware of the allegation of mistreatment made by appellant.[2]

STATUTES INVOLVED

Title 18, United States Code, § 4082, provides:

> Persons convicted of an offense against the United States shall be committed, for such terms of imprisonment as the court may direct, to the custody of the Attorney General of the United States or his authorized representative, who shall designate the places of confinement where the sentences shall be served.
>
> The Attorney General may designate any available, suitable, and appropriate institutions, whether maintained by the Federal Government or otherwise, or whether within or without the judicial district in which the person was convicted.
>
> The Attorney General may order any inmate transferred from one institution to another.
>
> The authority conferred upon the Attorney General by this section shall extend to all persons committed to the National Training School for Boys.

Title 18, United States Code, § 4243, provides:

> The superintendent of the United States hospital for defective delinquents shall notify the proper au-

[2] Affidavit of James V. Bennett, former Director of the Federal Bureau of Prisons, executed November 4, 1964.

thorities of the State, Territory, District or Possession where any insane prisoner has his legal residence, or, if this cannot be ascertained, the proper authorities of the State, Territory, District, or Possession from which he was committed, of the date of expiration of sentence of any prisoner who, in the judgment of such superintendent, is still insane or a menace to the public. Such superintendent shall cause such prisoner to be delivered into the custody of the proper authorities of such State, Territory, District or Possession.

SUMMARY OF ARGUMENT

A public officer cannot be vicariously liable for tortious conduct of subordinates in which he did not participate. Even though the Attorney General of the United States and his subordinates erroneously construe and apply statutes relating to the transfer of prisoners they are not personally liable in damages. Assuming appellee ordered the transfer of appellant, he was acting in the line of official duties and the "official immunity" doctrine precludes maintenance of a tort action against appellee.

ARGUMENT

Appellee is not liable in damages for alleged tortious conduct of subordinates

Appellant maintains that he is entitled to damages from appellee for the allegedly tortious conduct of his subordinates.

Assuming appellant's claims constitute a cognizable action, the record clearly discloses that appellee did not participate in, or have personal knowledge of, the allegedly tortious conduct of which appellant complains. Appellee, as a public officer, cannot be vicariously liable for tortious conduct of subordinates in which he did not participate and of which he had no knowledge. *Robertson* v. *Sichel*, 127 U.S. 507 (1888); *Tucker* v. *Duke*, 107 U.S.

App. D.C. 253, 276 F.2d 499 (1960); *Jones* v. *Kennedy*, 73 App. D.C. 292, 121 F.2d 40 (1941).

Appellant was transferred by order of H. G. Moeller, Assistant Director of the Bureau of Prisons, pursuant to 18 U.S.C. § 4082. Appellant maintains that he could be transferred only pursuant to 18 U.S.C. § 4243. Assuming *arguendo* the validity of appellant's contention, even though the Attorney General of the United States and his subordinates erronously construe and apply statutes relating to the transfer of prisoners, they are immune from personal liability in damages. See *Taylor* v. *McGarth*, 90 U.S. App. D.C. 201, 194 F.2d 883, (1952).

Even if, contrary to the documents in the record, it were to be assumed that appellant's transfer was personally known to appellee, and that appellee ordered this transfer, the order would be an action performed while appellee was acting in the line of official duties.[3] As such, the "official immunity" doctrine absolutely precludes maintenance of a tort action against appellee for civil damages. *Barr* v. *Matteo*, 360 U.S. 564 (1959); *Laughlin* v. *Rosenman*, 82 U.S. App. D.C. 164, 163 F.2d 838 (1947); *Norton* v. *McShane*, 332 F.2d 855 (5th Cir. 1964).

---

[3] The Director of the Bureau of Prisons is an "authorized representative" of the Attorney General and may direct the transfer of federal prisoners from one institution to another. *Mullican* v. *United States*, 252 F.2d 398 (5th Cir. 1958).

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
GIL ZIMMERMAN,
PATRICK H. CORCORAN,
Assistant United States Attorneys.

☆ U. S. GOVERNMENT PRINTING OFFICE, 1965 774775 837